

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

November 28, 2011 Session

MARIE AKINS v. WHIRLPOOL CORPORATION

**Appeal from the Circuit Court for Rutherford County
No. 60383 Robert E. Corlew, III, Judge**

**No. M2011-01258-WC-R3-WC - Mailed December 28, 2011
January 30, 2012**

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. Marie Akins ("Employee") alleges that she developed carpal tunnel syndrome in her left wrist while employed as a factory worker by Whirlpool Corporation ("Employer"), prior to the closure of Employer's plant in August 2008. Employer denies that Employee's carpal tunnel syndrome in her left wrist was caused by her employment with it. The trial court found that Employee's left-wrist carpal tunnel syndrome was not caused by her employment with Employer and that Employer therefore is not liable for this injury. Employee has appealed, contending both that the evidence preponderates against the trial court's finding and that Employer is estopped from denying liability based on delay in the diagnosis of Employee's carpal tunnel syndrome in her left wrist. We affirm the trial court's judgment.

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2008) Appeal as of Right; Judgment of the
Circuit Court Affirmed**

D. J. ALISSANDRATOS, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, C. J. and WALTER C. KURTZ, SR. J., joined.

D. Russell Thomas and Melinda K. Brown, Murfreesboro, Tennessee, for the appellant, Marie Akins.

David T. Hooper, Brentwood, Tennessee, for the appellee, Whirlpool Corporation.

MEMORANDUM OPINION

Factual and Procedural Background

Employee worked for Employer for approximately nineteen years performing production work on a production line, including the repetitive use of power tools. Employee ceased working for Employer on August 13, 2008, due to the closing of Employer's plant.

Employee developed problems in her right wrist which she reported to Employer in May 2007. She was treated conservatively by Employer's nursing personnel until approximately March 2008, when she came under the care of Dr. Pelmore, who restricted Employee's use of her right hand and instructed her to wear a splint while working, although there is some indication of noncompliance with this latter restriction. In any event, Employee's condition did not improve, and she was referred to an orthopedic surgeon, Dr. Roderick Vaughan, in approximately May 2008. Dr. Vaughan diagnosed Employee as suffering from moderate carpal tunnel syndrome and de Quervain's tenosynovitis,¹ as well as a tear of the right extensor pollicis brevis tendon. He performed corrective surgery on July 11, 2008, and released Employee to return to work on July 28, 2008, with restrictions, including no use of her right hand.²

Employee returned to work for Employer on July 28, 2008. On August 6, 2008, Employee reported to Employer an injury to her left wrist. According to the "Employee Incident Report" she completed on that date, the injury occurred in March 2008. Employee described the incident as follows: "In March, Cleaning refrigerators. Since surgery on Right hand I now tape instruction books on units." In her trial testimony, Employee testified that a few days after her return to work in July 2008, her left hand and wrist pain worsened. Employee testified that she had experienced this pain even before the July 2008 surgery on her right hand, and as early as December 2007. According to Employee, her right hand became so problematic that she put most of the pressure on her left hand while she was working for Employer, causing the pain in her left hand and wrist to worsen. Employee testified that after she returned to work following the July 2008 surgery on her right wrist, she worked with her left hand exclusively and soon thereafter began experiencing problems with her left wrist, so she decided to report her left wrist and have it checked at that time.

¹ This condition "is an irritation of the lining of the tendons in the first dorsal compartment of the wrist. It is characterized by swelling, irritation, and pain." Williams v. Tecumseh Products Co., 978 S.W.2d 932, 934 n.3 (Tenn. 1998).

²The injury to Employee's right upper extremity is not at issue in this case. However, it is discussed herein for purposes of background and context.

However, Dr. Pelmore's records throughout March 2008, and as late as March 28, 2008, make no mention of any complaint by Employee regarding her left wrist or hand. The first mention of any problem regarding Employee's left wrist is in an April 4, 2008 note in which Dr. Pelmore records a new complaint from Employee regarding her left thumb, not her left wrist. Similarly, Dr. Vaughan's note from Employee's initial May 2008 visit makes no mention of any complaints regarding Employee's left wrist or hand.

After Employee reported the problem with her left wrist to Employer on August 6, 2008, Employee again came under the care of Dr. Pelmore, who saw Employee for the first time regarding left-wrist pain on August 8, 2008. Dr. Pelmore examined Employee and diagnosed degenerative joint disease in her left wrist. Dr. Pelmore prescribed rest, ice, a splint, and over-the-counter medication. Dr. Pelmore again examined Employee on August 15 and 29, 2008, but her diagnosis and course of treatment remained the same. When Employee returned on August 29, 2008, Dr. Pelmore released her with no restrictions, instructing Employee to return on an as-needed basis only. Employee testified at trial that she did not again seek treatment from Dr. Pelmore until January 2010.

On the referral of her attorney, Employee was evaluated on November 11, 2008, by Dr. Richard Fishbein, an orthopedic surgeon. On the intake form for this evaluation, Employee indicated both right and left wrist pain. Dr. Fishbein testified by deposition that he considered Employee's right and left wrists during this evaluation. Dr. Fishbein's report from this evaluation stated in part:

Mrs. Akins' complaint was that of frequent pain with aching, locking, stiffness and weakness of her right wrist, hand and thumb as the result of an injury that occurred during the normal scope and course of her employment with Whirlpool. She described how she repetitively used a screw gun when she had the onset of right wrist pain. She has since developed left wrist pain as well. She continues to experience difficulties with household chores and daily activities of living involving any gripping and lifting of objects and with twisting of her wrists. Weather changes also increase her discomfort.

Dr. Fishbein also stated that he "performed a comprehensive physical examination" of Employee. However, Dr. Fishbein conceded in his deposition testimony that he had not ordered nerve conduction testing on Employee's left wrist, but only on her right wrist. According to Dr. Fishbein's testimony, he could not recall why he had not ordered testing on Employee's left wrist during the November 11, 2008 evaluation. Dr. Fishbein also

conceded that he made no notation of a positive Phalen's test or Tinel's sign³ on the left or of two-point discrimination on the left. Dr. Fishbein concluded in his evaluation report from November 11, 2008, that Employee suffered a permanent partial impairment to the right upper extremity as a result of residual carpal tunnel syndrome in that extremity. He made no diagnosis with respect to Employee's left wrist, stating only that she had not reached maximum medical improvement for her left wrist. Dr. Fishbein also stated in his November 11, 2008 evaluation that Employee's employment at Whirlpool caused her "bilateral hand and wrist conditions," though, again, he did not diagnose the condition in her left wrist at that time.

Employee saw Dr. Pelmore on January 27, 2010, complaining with left wrist pain. Dr. Pelmore again diagnosed degenerative joint disease of the left wrist and prescribed ice, Ibuprofen, and a wrist splint. Dr. Pelmore recommended Employee undergo an evaluation for arthritis, but released Employee with no restrictions, directing her to return only as needed.

Dr. Fishbein evaluated Employee again on May 4, 2010, on referral of her attorney, and issued a May 10, 2010 report from this evaluation. In this report, Dr. Fishbein stated that Employee had been experiencing symptoms in her left wrist similar to those in her right wrist since August 6, 2008, due to favoring her previously injured right wrist. Dr. Fishbein's report also reflected that Employee reported frequent pain with aching, numbness, tingling, swelling, and tenderness of her left wrist and continued to experience difficulty with household chores and daily activities that involved any gripping and lifting of objects or bending and twisting of her wrist. Based on his examination, Dr. Fishbein determined that Employee had a positive Phalen's sign on the left, as well as on the right, two-point discrimination greater than ten mm over the bilateral fourth digits, and reduced grip strength on the left. A nerve conduction study also revealed moderate carpal tunnel syndrome on Employee's left upper extremity. Dr. Fishbein attributed this condition to Employee's work for Employer, which had ended in August 2008.

In his deposition, Dr. Fishbein similarly testified that Employee's carpal tunnel syndrome in her left wrist was caused by her work at Employer. While he conceded that the

³ "The Phalen's test is performed by flexing the wrist and holding it flexed for up to one minute. If the patient complains of tingling and numbness at the distribution of the median nerve of the hand, the test is said to be positive at that time. This test is used to determine whether a patient is suffering from carpal tunnel syndrome." Williams, 978 S.W.2d at 934 n.2. "The Tinel's test is executed by digital tapping on the median nerve at the wrist to measure changes in the sensation of her fingers and thumbs." Reece v. J.T. Walker Indus. Inc., No. E2006-01555-WC-R3-WC, 2007 WL 4322003, *2 n.4 (Tenn. Workers' Comp. Panel Dec. 11, 2007).

condition in Employee's left wrist worsened between 2008 and 2010, when she was no longer working for Employer, Dr. Fishbein opined that Employee had carpal tunnel symptoms on her left wrist even in 2008, that statistically, carpal tunnel syndrome is frequently bilateral, and that Employee's housework and other activities between 2008 and 2010 merely aggravated her pre-existing left side carpal tunnel syndrome.

Employee testified at trial that the problems with her left wrist had worsened since her employment with Employer ended in August 2008. She further testified that her household chores adversely affected the condition.

Based upon the foregoing proof, the trial court determined that Employee had not suffered a permanent injury related to the left side carpal tunnel syndrome at the time she ceased working for Employer and that her employment with Employer did not cause the carpal tunnel syndrome in the left wrist.

Standard of Review

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. §50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony included in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

1. Causation

Employee bears the burden of proving each element of her cause of action in a workers' compensation case. Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992). "Although workers' compensation law must be construed liberally in favor of an injured employee, it is employee's burden to prove causation by a preponderance of the evidence." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008). Case law requires a trial court to resolve "reasonable doubt" as to causation in favor of the

employee. See, e.g., Phillips v. A&H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004). The trial court, however, is not required to ignore either discrepancies in the employee's testimony or other evidence that tends to disprove the employee's claim.

While Employee testified at trial that she experienced problems in her left wrist as early as December 2007, the records from her treating physicians make no mention of left wrist complaints as late as March 2008. Moreover, even after Employee reported left wrist pain to Employer in August 2008, and was treated for this, there was no diagnosis of a permanent injury, and she was released with no restrictions and no required follow-up. Even when Employee's evaluating physician, Dr. Fishbein, examined Employee on referral from her attorney in November 2008, regarding both her right and left wrists, he did not perform diagnostic testing of Employee's left wrist, and he made no mention of carpal tunnel syndrome on the left side at that time.

Employee did not again seek treatment for her left wrist until January 2010, seventeen months after she last worked for Employer. Even at that time, Employee's treating physician did not diagnose carpal tunnel syndrome in her left wrist, but continued to diagnose only degenerative joint disease with no permanent injury. In May 2010, some twenty-one months after Employee last worked for Employer, Employee's evaluating physician, Dr. Fishbein, first diagnosed Employee with left-wrist carpal tunnel syndrome. While Dr. Fishbein related Employee's left carpal tunnel syndrome to her employment with Employer, Employee conceded at trial that her condition had grown progressively worse since she had stopped working for Employer in August 2008, and that her condition since that time had been adversely affected by her routine household chores.

Although this is a close case, having examined the record in its entirety, we conclude that the evidence does not preponderate against the trial court's finding that Employee failed to sustain her burden with respect to causation.

2. Estoppel

Employee asserts that Employer should be estopped from denying liability based on the diagnosis of carpal tunnel syndrome in her left wrist. According to Employee, any delay in diagnosis resulted from Employer's failure to afford Employee treatment. The record fails to support this assertion.

Employer did not assert at trial a delay in Employee's diagnosis as the basis for a statute of limitations defense. Rather, Employer asserted the delay in Employee's diagnosis as evidence that Employee's carpal tunnel syndrome in her left wrist was not caused by her former employment with Employer. The record establishes that when Employee notified

Employee of problems with regard to her left wrist in August 2008, she was promptly referred to and treated by Dr. Pelmore. After her release from Dr. Pelmore's care in August 2008, Employee did not again seek treatment for her left wrist until January 2010. Further, Employee was examined by her evaluating physician, Dr. Fishbein, in November 2008, regarding both her right and her left wrist, yet Dr. Fishbein did not deem it necessary to perform diagnostic testing on Employee's left wrist, nor did he diagnose Employee with left-wrist carpal tunnel syndrome at that time. There is no basis for the application of estoppel as sought by Employee.

Conclusion

The judgment of the trial court is affirmed. Costs of this appeal are taxed to Marie Akins and her surety, for which execution may issue if necessary.

D. J. ALISSANDRATOS, SPECIAL JUDGE

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Marie Akins and her surety, for which execution may issue if necessary.

PER CURIAM